IN THE HIGH COURT OF BOMBAY AT GOA

Appeal from Order No.69/2005

1.Mr. Antonio Jose Fernandes
aged about 49 years; and his wife;

2. Mrs. Antonetta Fernandes
aged about 49 years, both resident of
House No.559, (new Bungalow
No.22/2003) Maddant, Fatorda,
Margao, Goa. ..... Appellants.

V/s.

1. Miss Petronila Fernandes alias
Petronila Fernandes, Spinster,
aged about 60 years, d/o. Late
Joao Rosario Fernandes, r/o.
Abade Faria Road,
Margao, Goa (expired)

2. Mr. Joaquim Manuel Sebastiao
Domingos Fernandes, aged about
38 years, son of Sebastiao Fernandes,
and his wife,

3. Mrs. Maria Lourenca Fernandes,
aged about 31 years, both residents
of Flat No.206, B-Wing, Harmony,
Lokhand Wala Complex,
Andheri (W), Mumbai – 400 053.

4 Mr. Joao Caetano Fernandes,
Aged about 65 years, son of Joao Rosario
Fernandes retired and his sons (expired)

through his legal heirs.

4 a. Mr. Placido Fernandes, major,
s/o. Late Joao Caetano
Fernandes, and his wife

4 b. Mrs. Lizia Fernandes, major,

4 c. Mr. John Fernandes, major, son
of late Joao Caetano Fernandes,

4 d. Mrs. Josephine Fernandes, major,

4 e. Mr. Joaquim Fernandes, major,
s/o. Late Joao Caetano Fernandes,
All r/o. H.No. 69, Ward No.13,
Malbhat, Margao, Goa.

5. Ms. Anarita Fernandes alias Florina
Fernandes, aged 62 years,
d/o. Late Joao Rosario Fernandes,
landlady r/o. H.No.234,
Sinquetim, Navelim, Salcete, Goa. ..... Respondents.

Mr. P.P. Singh, Advocate for the appellants.

Mr. C.A. Coutinho, Advocate for respondents No.2 and 3.

CORAM : P.V. KAKADE, J.

DATE : 14TH AUGUST, 2006.

ORAL JUDGMENT :

Rule. By consent rule made returnable forthwith.

2. Heard learned Counsel for both the parties. Perused the record. The appellants-defendants have preferred this appeal against the Judgment and Order passed by the Adhoc Additional District Judge, Margao dated 21.12.2004 whereby the appeal was allowed and the Judgment and Order dated 31.5.2002 passed by the trial Court was set aside with direction that the matter was to be remanded to the trial Court for answering issue no.7 and dispose of the suit in accordance with law.

3. The suit for partition was filed by the plaintiffs by which, it was the case of the plaintiffs that the plaintiff No.1, defendant No.1 and the defendant No.4 are the children of late Joao Rosario Fernandes and late Luisinha Fernandes and defendant No.2 is the husband of defendant No.3 and son of defendant No.1 and plaintiff No.2 is the nephew of plaintiff no.1 being the son of her sister late Ritinha Fernandes. It was further the case of the plaintiffs that plaintiff No.1 and defendant No.4 had jointly purchased 1/10th of the entire property

described in the Land Registration Office under No.16333 new series situated at Fatorda, Margao by Sale Deed dated 21.12.1950, which was registered according to law and the 1/10th part of the said property forms part of the suit property. It was further alleged that the suit property constitutes separate and distinct property by itself and is surveyed in the Office of City Survey, Margao under Chalta Nos. 51, 52, 53, 54, 55 and 56 of P.T. Sheet No.73 and a dwelling house existing therein is occupied by plaintiff No.1 and defendant No.4. That plaintiff No.1 has 2/3rd share in the suit property, while the defendant No.4 has 1/3rd share in the suit property by virtue of Deed of Gift dated 11.8.1975, which was duly registered. The sum and substance of the matter is that the plaintiffs claim that they are entitled to separate their 2/3rd share from the 1/3rd share of the defendants, so as to constitute their separate and independent ownership over that portion.

4. Defendants No.1, 2 and 3 on one hand and defendant No.6 on the other hand, filed their separate written statements, challenging the contentions of the plaintiffs and sought dismissal of the plaintiffs' suit on various grounds.

5. The learned trial Judge, on the basis of the pleadings, adjudicated the dispute on merits and came to the conclusion that the plaintiffs have proved that plaintiff No.1 and defendant No.1 had jointly purchased the suit property. The trial Court held that it was not proved by the plaintiffs that plaintiff No.1 has 2/3rd share and defendant No.4 has 1/3rd share in the suit property. It was held that plaintiffs failed to prove that the suit property is described in the name of plaintiff No.1 and defendant No.4 in the record of rights. The trial Court came to the conclusion that defendants No.1, 2 and 3 have proved that the plaintiffs had no locus standi to file the suit and the suit property was exclusively belonging to the defendants. It proceeded to hold that defendants succeeded in proving that they were in actual, and physical possession of the suit property adverse to that of plaintiff No.1 and defendant No.4 for over 30 years and as such, the suit came to be dismissed.

An appeal was preferred to the District Court, Margao. The learned appellate Court Judge while taking up the appeal for hearing appears to have been carried away by the fact that issue regarding adverse possession which was framed as issue no.6, but was in fact issue No.7

framed as an additional issue, was not adjudicated at all though the finding was recorded in the affirmative in favour of the defendants on that issue. Therefore, relying on the provision of Order XIV, Rule 2 and Order XX, Rule 5, it was observed that it was the duty of the trial Court to adjudicate that issue as per law while deciding the suit. On this basis, the appeal came to be allowed and the Judgment, Order and Decree dated 31.5.2002 of the trial Court was set aside with direction that the matter was remanded to the trial Court for answering issue no.7 and dispose of the suit in accordance with law.

6. Now on this background, at the time of hearing, the learned Counsel appearing for the appellants/defendants submitted that in remanding the matter the appellate Court committed error in setting aside the entire Judgment and Order passed by the trial Court. In fact, only adjudication regarding issue No.7 i.e. on the point of adverse possession was required to be adjudicated by the trial Court on remand. It was also pointed out and it is seen from the record that while remanding the matter, the appellate Court has set aside the entire Judgment and Order of the trial Court without even a whisper in respect

of merits of the factual aspects of other issues adjudicated by the trial Court which, in my considered view, is a patent illegality. At this stage, learned Counsel for the appellant/defendants submitted that he was ready to forgo the plea of adverse possession which was raised by way of amendment of the plaint in the course of trial which gave rise to the framing of an additional issue regarding adverse possession. To that effect, the learned Counsel for the appellants has undertaken to file *pursis* which is accepted at this stage.

7. Once we reach to this position, there is absolutely no question of adjudicating the issue of adverse possession by the trial Court, nor there is any reason for remand of the suit for trial of entire issues afresh.

8. In the result, the matter will have to be remanded to the District Court for adjudication of the remaining issues which are decided by the trial Court on the basis of the available evidence on record.

9. Hence, the rule is made absolute. The appeal is allowed. The Judgment and Order passed by the Adhoc Additional District Judge, Fast

Track Court-I, Sought Goa, Margao dated 21.12.2004 is, hereby, set aside. The matter is remanded to the District Court, Margao with direction that there is no reason why the issue regarding adverse possession should be adjudicated by the lower Court as the said pleadings have become redundant by virtue of the pursis filed by the appellants/defendants. The District Court is directed to adjudicate the appeal on the basis of the already led evidence on record in the course of the trial and give its finding and dispose of the same according to law, within four months from the date of receipt of writ of this Court. Under the circumstances, there shall be no order as to costs.

P.V. KAKADE, J.

ssm